

Letters of Findings Number: 04-20120724, 04-20130053
Sales Tax
For the Years 2009-2011

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ISSUE

I. Sales Tax—Contractors.

Authority: IC § 6-8.1-5-1; [45 IAC 2.2-3-9](#); [45 IAC 2.2-3-10](#); [45 IAC 2.2-3-12](#); [45 IAC 2.2-4-22](#); [45 IAC 2.2-4-23](#).

Taxpayer protests the Department's assessment of sales tax on its construction contracts.

STATEMENT OF FACTS

Taxpayer is a corporation doing business in Indiana. Taxpayer sells merchandise at its stores. A portion of the merchandise it sells consists of construction materials and other items that are incorporated into real estate.

For some sales, Taxpayer entered into contracts with its customers for tangible personal property and installation of the property. Taxpayer treated these contracts as lump sum contracts for sales and use tax purposes. Thus, Taxpayer self-assessed use tax on the tangible personal property specified in the contract and did not charge its customers sales tax on the tangible personal property. The use tax was remitted based on Taxpayer's purchase price of the tangible personal property.

The Indiana Department of Revenue ("Department") disagreed with Taxpayer's characterization of its construction contracts as "lump sum" contracts. Instead, the Department characterized the contracts as "time and materials" contracts.

Because the Department characterized the contracts as time and materials contracts, Taxpayer was a retail merchant with regard to the tangible personal property portion of the contracts and, according to the Department, should have assessed sales tax on the retail value of the materials sold. The Department assessed sales tax based on Taxpayer's contracts, while permitting an offset for the use tax previously remitted by Taxpayer. Taxpayer protested this portion of the assessment.

The Department contacted Taxpayer's representative regarding an administrative hearing. However, that representative indicated that its protest was filed to preserve its rights in the event of a ruling favorable to its legal position in another case. Taxpayer's representative indicated that it did not wish to have a hearing, and thus this Letter of Findings is based on Taxpayer's protest letter and the arguments made in the protest letter.

I. Sales Tax—Contractors.

DISCUSSION

Taxpayer protests the assessment of additional sales tax on various items used in fulfillment of construction contracts. The issue is whether Taxpayer's contracts are lump sum contracts or time and materials contracts.

Under IC § 6-8.1-5-1(c):

If the person has a surety bond guaranteeing payment of the tax for which the proposed assessment is made, the department shall furnish a copy of the proposed assessment to the surety. The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

A "lump sum" contract is a contract for which all necessary materials and labor are performed for one specified price. In a lump sum contract, the customer is not charged sales tax; however, the construction contractor generally must pay sales tax or self-assess use tax on its purchase price for the materials. [45 IAC 2.2-3-9\(e\)\(3\)](#); [45 IAC 2.2-3-10\(3\)](#); [45 IAC 2.2-4-22\(d\)\(3\)](#); [45 IAC 2.2-4-23\(3\)](#). Thus, if B enters into a lump sum contract with C for \$10,000, B is not a retail merchant on this transaction and does not collect sales tax. However, if B pays A \$4,000 for materials incorporated in C's real property, B must pay sales tax or self-assess use tax on the \$4,000 unless C could have purchased the materials directly without incurring sales and use tax.

A "time and materials" contract is a contract in which the materials and labor are sold for separately quoted prices. Using the transaction described above, if B and C entered in a contract for a \$10,000 total price, with \$4,500 for materials and \$5,500 for labor, B is treated as a retail merchant selling the materials to C and must collect sales tax on the \$4,500 in materials. However, when B purchases the materials for \$4,000 from A, B can purchase the materials exempt because B is treated as a reseller. [45 IAC 2.2-3-9\(d\)\(1\)](#); [45 IAC 2.2-4-22\(d\)\(1\)](#). However, the fact that an invoice provides a separate listing for materials and labor does not necessarily result in a contract being a time and materials contract. [45 IAC 2.2-3-12\(e\)](#).

Taxpayer stated that its protest is based on that of a different, unaffiliated company which is currently in litigation. While the Department understands Taxpayer's filing of the protest to preserve its rights in the event the

outstanding litigation is resolved, Taxpayer has not provided sufficient legal or factual grounds to justify reduction or elimination of the assessment.

FINDING

Taxpayer's protest is respectfully denied.

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